



15-008

THE PRINCE GEORGE'S COUNTY GOVERNMENT BOARD OF ETHICS

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BOARD ADVISORY OPINION

August 28, 2014

[REDACTED]
9200 Basil Court
Largo, Maryland 20774

Re: Case Number: 15-008

Dear [REDACTED]:

You have requested advice regarding a potential conflict of interest issue arising out of your position as a part-time contractor with the Redevelopment Authority of Prince George's County, Maryland ("RDA") and your position as a board member for D.C. Greenworks ("DCG"), a District of Columbia-based 501(c)(3) non-profit organization that is seeking to do business with Prince George's County (the "County").

The specifics of your inquiry, as gathered from your letter dated July 21, 2014, are as follows:

You assist RDA in the formulation of various affordable housing programs and green building initiatives, advising on real estate matters as they arise in the creation and implementation of RDA programs. Prior to commencing work with RDA in October 2013, you joined the board of directors of DCG. DCG is an installer of "green roofs" and related structures in the Washington, D.C. metropolitan area.

One of your assignments with RDA is that of project manager for the "Net-Zero Home Demonstration Project" (the "Project"), an RDA initiative designed to transform one of its vacant residential properties in the town of Mt. Rainier into an energy efficient home with a renewable energy system. The RDA initiative commenced with a public solicitation or Request for Proposal ("RFP") to developers with experience in green building and residential development. According to your letter, your job was to work with the Executive Director of RDA and others to draft the RFP and manage the procurement process, including structuring the selection process

and leading a Proposal Analysis Group ("PAG") consisting of three RDA employees to score and rank the proposals. The Executive Director of RDA, after considering the PAG analysis and recommendations, and with final authorization from the board of directors of RDA, would select the winning bidder. You would then manage contractual negotiations and the implementation of the Project.

After assisting with the drafting of the RFP, you mentioned to the Executive Director of DCG, that RDA was soliciting proposals for the Project, and that you would have to recuse yourself from all discussions and decision making made by DCG regarding the RFP. According to your letter, as a result of this communication with the Executive Director for DCG, DCG did not inform you of its decision to submit a proposal in response to the RFP. On the day the proposals were due at RDA, you discovered that DCG submitted a proposal for the Project. Subsequent to this discovery, you and RDA contacted the Office of Ethics and Accountability (the "Office"), which provided you and RDA with informal advice. You now seek a formal opinion as requested in your letter dated July 21, 2014.

Applicable County Code Provisions

Sec. 2-290. Statement of purpose and policy.

(a) The Prince George's County Council, recognizing that our system of representative government is dependent in part upon the people maintaining the highest trust in their public officials and employees, finds and declares that the people have a right to be assured that the impartiality and independent judgment of public officials and employees will be maintained.

(b) It is evident that this confidence and trust is eroded when the conduct of the County's business is subject to improper influence and even the appearance of improper influence.

(c) For the purpose of guarding against improper influence, the County Council enacts this Code of Ethics to require County elected officials, officials, employees, and individuals appointed to boards and commissions to disclose their financial affairs and to set minimum standards for their conduct of local business.

(d) It is the intention of the Council that this Division, except its provisions for criminal sanctions, be liberally construed to accomplish this purpose.

Section 2-293. Prohibited conduct and interests.

(a) Participation Prohibitions. Except as permitted by Board regulations or opinion, an official or employee may not participate in:

(1) Any matter, except in the exercise of an administrative or ministerial duty which does not affect the disposition or decision with respect to that matter, if, to his knowledge, he, his spouse, parent, child, brother, or sister has an interest therein.

(2) Any matter, except in the exercise of an administrative or ministerial duty which does not affect the disposition or decision with respect to the matter, when any of the following is a party thereto:

(A) Any business entity in which he has a direct financial interest of which he may reasonably be expected to know;

(B) Any business entity of which he is an officer, director, trustee, partner, or employee, or in which any of the above-listed relatives has this interest;

(C) Any business entity with which he or, to his knowledge, any of the relatives listed in paragraph (1) of this Subsection is negotiating or has any arrangement concerning prospective employment;

(D) Any business entity which is a party to an existing contract with the official or employee, or which the official or employee knows is a party to a contract with any of the above-named relatives, if the contract could reasonably be expected to result in a conflict between the private interests of the official or employee and his official duties;

(E) Any entity doing business with the County in which a direct financial interest is owned by another entity in which the official or employee has a direct financial interest, if he may be reasonably expected to know of both direct financial interests; or

(F) Any business entity which the official or employee knows is his creditor or obligee, or that of any of the relatives listed in paragraph (1) of this Subsection, with respect to a thing of economic value and which, by reason thereof, is in a position to affect directly and substantially the interest of the official or employee or any of the above-named relatives.

(3) If a disqualification pursuant to paragraphs (1) or (2) of this Subsection leaves anybody with less than a quorum capable of acting, or if the disqualified official or employee is required by law to act or is the only person authorized to act, the disqualified person shall disclose the nature and circumstances of the conflict and may participate or act.

Analysis

Section 2-293(a)(2)(B) prohibits you, an official and contractual employee of RDA, an instrumentality of the County, from participating in any matter, except in the exercise of a purely administrative function, when the non-profit organization for which you serve as a director is a party.¹ Your position as a project manager with RDA is an important one, and your responsibilities as a member of the Board of Directors for DCG, is equally important. In your role with RDA, you assisted with the creation of the RFP. As a director for DCG, you are part of body of elected or appointed members who jointly oversee the activities of a company. RDA has issued an RFP with your assistance, and DCG has submitted a bid in response to the RFP. Neither role at RDA and DCG can be considered clerical, nor can one be reconciled with the other when the two intersect as they do in the instant matter. Correspondingly, DCG's submitted proposal in which it hopes to acquire real property from the County cannot be considered trivial. Although "public subsidies" as you may understand the term to mean, will not be provided to the winning bidder of the RFP by RDA, we nonetheless consider County property assessed at \$75,100.00 to be a public resource, and its acquisition by a private entity and potential resale at fair market value enough financial incentive to cause a developer to want to enter into a business relationship with RDA.² Thus, while you may not have a pecuniary interest in the instant matter, the non-profit entity on which whose board you sit, does. Assuming *arguendo*, however, that

¹ The Code of Ethics defines an "employee" as simply "an individual who is employed by the County." An "official" an elected official, an employee of the County, or a person appointed to or employed by the County or any County agency, board, commission, or similar entity whether or not paid in whole or in part with County funds and whether or not compensated.

² A review of SDAT and RFP documents in this matter reveal the assessed value of the subject property for the Project to be \$75,100 as of July 1, 2014. Similarly situated homes in the vicinity of the subject property are listed at between \$200,000 and \$300,000.

DCG stands to lose or make no money whatsoever in this endeavor, the Code of Ethics (the "Code") as you aptly stated in your July 21, 2014, letter, -"is not limited to situations of financial interest."

With regards to the cessation of the Code's applicability to the given situation upon your resignation from Board of Directors of DCG, we do not agree. Though you may believe, and it may well be the case, that your "duty of loyalty" to DCG ends when you leave the board, the Code is not concerned with what you may believe, but rather what people might think. Even the appearance of improper influence is to be avoided. The County, through enactment of the Code, has promised its citizens and those it does business with, that it will maintain the impartiality and independent judgment of public officials and employees. In order to do so, the Code must be broadly interpreted.³

With regards to your remaining questions, we opine the following:

- If [you] had resigned from the DCG Board of Directors after receipt of the proposal submissions, and before the PAG was established and the selection process commenced, could [you] have participated in the PAG of 3 staff members?

By virtue of your involvement in the creation of the RFP while a member of DCG, you cannot participate in the PAG. In fact, the submission of a bid by DCG in response to an RFP that you helped create while with DCG, could be grounds for a bid protest by a competing bidder. Your involvement in the RFP may form the basis for the disqualification of DCG.

- Now that the PAG has been established, without [your] involvement, if [you] resigned from the DCG Board of Directors at this point, would [you] be allowed to become part of the PAG (as a fourth member) and participate in the selection process?

For the reasons stated above, we answer in the negative. Your participation in the PAG or continued involvement, in any manner, with the Net-Zero Home Development Project involving a party in which you were recently affiliated with in more than an administrative capacity, would be considered a very serious conflict of interest.

- Are either of the answers to the first two questions affected by [your] status as a non-employee/contractor? And is so, which way? If [your] employment status does matter, what are the answers to the two first questions if [you] become an employee?

The conflict of interest that arises from your prior, current, and future involvement in the instant matter does not change regardless of your employment status with RDA or DCG. The Code makes no discernible difference between a contractual employee and a non-contractual or regular employee. If you were a volunteer for both RDA and DCG, the conflict would still exist due to the level of your involvement in the RFP and your work with DCG.

³ See Prince George's County Code § 2-289.

- If [you] remain completely outside of the selection process, and the RDA officially selects the team with DCG on it as the winner of the RFP, will [you] be required to resign from the DCG board in order to continue with [your] project management duties for this project? [Or] does the fact that the selection has occurred without [your] input free [you] from future conflict?

If the RDA officially selects the team with DCG, the fact that you did not participate in the selection process will not remove the taint of impropriety or appearance of conflicting interests. Though we cannot divine every conceivable conflict of interest or care to enter into conjecture or speculation regarding same, it suffices to say that your involvement in the RFP is reason alone for future conflict.⁴

- Are any County employees permitted to serve as employees and serve on volunteer boards of directors? And if so, under what circumstances?

County employees are permitted to serve on volunteer boards of directors within the parameters established in the Code of Ethics. A determination of an employee's ability to serve on a board is made on a case-by-case basis.

- If [you do] resign from the DCG Board, at what point would [you] be permitted to rejoin the DCG Board, without creating an appearance of conflict?

So long as DCG is involved in the Project that you participated in while serving on the Board of Directors for DCG, an appearance of conflict will exist. If DCG does not have a business relationship with RDA while you are employed with RDA, no conflict of interest exists.

- If DCG, of its own accord, removes itself from the team that submitted a proposal under the RFP, then, from that point forward, can [you] remain on the DCG Board of Directors (or rejoin, if [you] had resigned) and continue with [your] project duties as originally contemplated?

⁴ Black's Law Dictionary describes conflict of interest as being a real or seeming incompatibility between one's private interests and one's public or fiduciary interests. Black's Law Dictionary (8th Edition, 2004). Conflict of interests is also defined as a situation in which a person has a duty to more than one person or organization, but cannot do justice to the actual or potentially adverse interests of both parties. This includes when an individual's personal interests or concerns are inconsistent with the best for a customer, or when a public official's personal interests are contrary to his/her loyalty to public business. An attorney, an accountant, a business adviser or realtor cannot represent two parties in a dispute and must avoid even the appearance of conflict. He/she may not join with a client in business without making full disclosure of his/her potential conflicts, he/she must avoid commingling funds with the client, and never take a position adverse to the customer. See <http://legal-dictionary.thefreedictionary.com/conflict+of+interest>

If DCG does not have a business relationship with RDA during the course of your employment with RDA, you should be able to remain on or rejoin the Board of Directors for DCG so long as doing so does not create any other real or apparent conflict of interest with RDA. Chapter XVIII, Section B, of RDA's Procurement Operating Procedures dealing with conflict of interest states that "no employee, officer or agent of [the] Authority shall participate directly or indirectly in the selection or in the award or administration of any contract if a conflict of interest, real or apparent, would be involved."

Conclusion

In view of the prohibition in Section 2-293 as discussed herein, we strongly advise that you recuse yourself and not participate in any County matter in which the non-profit organization on whose board you serve is a party. Further, because 2-290(b) indicates a concern for "even the appearance of improper influence," it is important to have a clear understanding that such recusal would adequately fulfill the objectives of the County Code of Ethics, which is to be broadly construed and strictly enforced. Your prior knowledge and participation in the development of the RFP may be grounds for DCG's disqualification from the selection process altogether. Chapter XV, Section B, of RDA's Procurement Operating Procedures regarding solicitation and award protests, states that "an actual or prospective contractor may protest the solicitation or award of a contract for serious violations of the principles of the Procurement Policy or these Operating Procedures."

In reaching this decision, the Board of Ethics has relied upon the facts you have presented.

Sincerely,

/s/ Covette Rooney
Covette Rooney
Board Chair